



Alan C. Lloyd, Ph.D.
Agency Secretary

State Water Resources Control Board

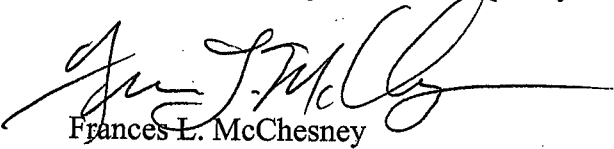
Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

TO: Kenneth D. Landau
James C. Pedri
Assistant Executive Officers
Central Valley Regional Water Quality Control Board

FROM: 
Frances L. McChesney
Senior Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: February 23, 2006

SUBJECT: HUMBOLDT ROAD BURN DUMP: LIABILITY FOR CLEANUP OF
AREA 8

ISSUE

In 1988, 2003, and 2005, the Executive Officer of the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board) issued cleanup and abatement and other orders to several parties, including Virginia L. Drake, Trustee, Drake Revocable Trust, (hereafter "Drake Trust"), James E. Simmons, Darwin H. and Nina R. Simmons, Trustees, Simmons Family Trust, (hereafter "Simmons"), and the City of Chico (hereafter "City"), requiring cleanup of parcels that were part of the Humboldt Road Burn Dump (HRBD) in Chico. The City contends that it is not responsible for cleanup of the Area 8 portion of the HRBD because, among other arguments, it did not control the disposal of contaminated material to Area 8. This Memorandum analyzes the liability of the City and the other parties for cleanup of Area 8 pursuant to Water Code sections 13267 and 13304.

SUMMARY

The City is a responsible party pursuant to Water Code section 13304 because it "caused and/or permitted" waste to be discharged to Area 8 when it hired contractors to excavate material on a City-owned right-of-way for a road construction project and those contractors deposited the material at Area 8. The City is responsible pursuant to Water Code section 13267 because it "discharged waste" within the Region. Drake Trust and Simmons are responsible parties pursuant to Water Code sections 13267 and 13304 because, among other reasons, they own the

land on which the discharge of waste has occurred. Of the parties named in the cleanup and abatement and other orders, only the City contests those orders.

BACKGROUND

The HRBD is a contiguous collection of 15 parcels containing, in whole or in part, waste from the disposal of municipal and/or commercial operations that contains waste as defined in Water Code section 13050 and hazardous materials as defined in Health and Safety Code section 25260(d). Studies of the HRBD conducted under contract to the City characterized the waste, delineated the extent, and confirmed the need for further remediation on several properties. Studies show that the HRBD had waste containing lead exceeding hazardous waste levels in some locations and significant other hazardous and non-hazardous waste constituents that pose a threat to human health and the environment, including waters of the state.

The HRBD includes parcel APN 018-390-014, which is referred to as Area 8. Area 8 is currently owned by Virginia L. Drake, the Drake Revocable Trust, Darwin H. Simmons, Nina R. Simmons, James E. Simmons, and the Simmons Family Trust. It was formerly also owned by John D. Drake. On 21 February 2001, John D. Drake deeded his 1/2 interest in the land to himself and Virginia L. Drake as trustees of the Drake Revocable Trust created on 23 January 2001. John D. Drake died on 22 November 2001. Virginia L. Drake, through the Drake Revocable Trust established with her deceased husband, John D. Drake, owns an undivided 1/2 interest, Darwin H. Simmons and Nina R. Simmons, through the Simmons Family Trust, own an undivided 1/4 interest, and James E. Simmons owns an undivided 1/4 interest in Area 8. The City does not own Area 8.

In 1982, the City decided to construct a two-lane extension from the intersection of Humboldt and Bruce Roads, northerly to State Highway 32 (the Bruce Road Extension Project), which is adjacent to the HRBD. On July 20, 1987, the City awarded the construction contract for the Bruce Road Extension Project to Baldwin Contracting Company, Inc. (hereafter "Baldwin"). The contract specifies that disposal of surplus construction material is the responsibility of the contractor. Baldwin excavated 31,700 cubic yards of material from the roadbed and, after obtaining permission from adjacent property owners, disposed of the surplus material on four HRBD properties (currently known as APN 018-390-014 (Area 8), 002-180-084, 002-180-086, and 018-500-136).

On August 13, 1987, Ed Simmons [James] granted Baldwin permission to dispose of surplus material from the Bruce Road Extension Project on the Simmons Ranch, which is referred to as Area 8 of the HRBD. A stock pond levee was constructed on the land with this material. On August 13, 1987, Mr. Ed Simmons wrote a letter to Baldwin relieving Baldwin of responsibility related to the pond. At the time of this letter, it appears from the record that Mr. Ed Simmons and Baldwin were not aware that the material was contaminated.

On September 16, 1987, in response to complaints from citizens, Water Board staff collected soil samples from the stock pond levee. Analyses of the samples showed the presence of polynuclear aromatic hydrocarbons at concentrations ranging from 2.3 µg/Kg to 84.9 µg/Kg, copper at concentrations ranging from 560 mg/Kg to 1,400 mg/Kg, total chromium at concentrations ranging from 75 mg/Kg to 110 mg/Kg, lead at concentrations ranging from 2,000 mg/Kg to 3,400 mg/Kg, and other metals. Levels of lead exceeding 1000 mg/Kg are considered hazardous. These constituents constitute waste as defined in Water Code section 13050. The volume of waste in the stock pond levee, i.e., Area 8, is approximately 7,500 cubic yards.

On December 21, 1987, Mr. Ed Simmons sent a letter to the City stating that he had negotiated directly with the City with respect to the stock pond levee and that he relied on the City that the material met all legal requirements and relied on the City that the material was not "toxic." In that letter he requested the City to remove the material. In response in a letter dated December 28, 1987, the City indicated that at that time there were no regulations governing the creation of the stock pond levee and it was permissible to establish the stock pond. The City also stated that no representation was made regarding the use of the material and that the use was strictly a matter between Baldwin and Simmons. The City also thanked Simmons for cooperating with the City on the Bruce Road Extension project.

On January 27, 1988, the Executive Officer issued Cleanup and Abatement Order No. 88-700 (1988 CAO), pursuant to Water Code section 13304, requiring the City, John D. Drake, and James E. Simmons to remove the Area 8 waste. In an effort to identify all the HRBD waste material and evaluate the threats to human health and the environment, including water quality, Water Board staff deferred enforcement of the 1988 CAO until investigation of other HRBD properties could be completed. None of those parties filed a petition with the State Water Board challenging the 1988 CAO.

In 1997, the City applied to the Cal/EPA Site Designation Committee with a request for designation of an administering agency pursuant to Health and Safety Code section 25260, *et seq.* (AB 2061). The Site Designation Committee designated the Central Valley Water Board as the administering agency. As the administering agency, the Central Valley Water Board has sole jurisdiction over the investigation and remediation of the site and is required to administer all applicable state and local laws. In its application, the City identified itself as the responsible party for the HRBD.

Under the oversight of the Central Valley Water Board, the City implemented a series of investigations and studies, including investigations of Area 8. In 2002, the City proposed consolidation of the waste from all 15 parcels, including Area 8, into an onsite waste management unit. In response to citizen requests, the City delayed completion of that project

and ultimately told the Water Board that the City would clean up only six of the 15 parcels, not including Area 8.

When it appeared that the City would no longer clean up the HRBD as contemplated in its application to the Site Designation Committee, the Executive Officer issued Cleanup and Abatement Order No. R5-2003-0707 (2003 CAO). The 2003 CAO names all of the reasonably identifiable parties responsible for the waste at the HRBD. The 1988 CAO addressed only Area 8, whereas the 2003 CAO addressed all 15 HRBD parcels. Most of the parcels that make up the HRBD have been cleaned up in compliance with the 2003 CAO, with the exception of two parcels referred to as Area 7 and Area 8. The Assistant Executive Officer issued two orders pursuant to Water Code section 13267 to the three sets of parties requiring submittal of technical reports needed prior to cleanup of the waste in Area 8.

DISCUSSION

Liability of the City

The City contends that it is not a responsible party subject to Water Code section 13304 or 13267 to investigate or cleanup the waste at Area 8. The bases for the contention are (1) the City had a contractual relationship with Baldwin with respect to the Bruce Road Extension Project that contained provisions that required Baldwin to procure, for example, all required permits and licenses and directed that Baldwin dispose of all surplus material from the excavation; (2) the Bruce Road Extension parcel was the location of burn dump activities that occurred on property not within the City limits at the time those activities occurred; (3) Butte County regulated such burn dump activities and did not require any permits; (4) the burn dump activities on the Bruce Road Extension parcel were not conducted by or on behalf of the City; (5) Mr. Simmons gave Baldwin permission to use the Bruce Road Extension materials on his land and Mr. Simmons had relieved Baldwin of any responsibility; (6) the City has never owned Area 8; and (7) the City never authorized or required Baldwin to dispose of the material on Area 8. See, Letter from David R. Frank, Chico City Attorney, to James C. Pedri, Central Valley Water Board Assistant Executive Officer (April 28, 2005)(Frank Letter). In summary, the City contends that the disposition of the Bruce Road Extension excavation material was the sole responsibility of Baldwin pursuant to an agreement between Baldwin and Simmons and without direction from or involvement by the City of Chico. The City also contends, in summary, that it has no access to Area 8 and, therefore, cannot be responsible for actions on that parcel. See Frank Letter.

The City, and other parties, filed petitions with the State Water Resources Control Board (State Board) seeking review of the 2003 CAO. The State Board dismissed those petitions without

prejudice.¹ Neither the City, nor any other named party, filed any petitions challenging the orders issued pursuant to Water Code section 13267.

The City has incorrectly interpreted the Water Code.

Water Code section 13304 states, in part, the following:

"Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharge where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up such waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

The facts do not appear to be in dispute with respect to Area 8. The City owned the property where the Bruce Road Extension project occurred, the City hired Baldwin to conduct the Bruce Road Extension Project, and Baldwin disposed of the materials from the Bruce Road Extension project onto four parcels of the HRBD with the permission of those landowners. Neither Baldwin nor the landowners were aware at the time of disposal that the materials contained lead and other wastes. The City prepared a Negative Declaration under the California Environmental Quality Act concluding that there would be no significant environmental effects of the Bruce Road Extension project.

Water Code section 13304 specifies that the Water Board may order any person who "caused or permitted" any waste to be discharged where it is, or probably will be, discharged into the waters

¹ See SWRCB/OCC File No. A-1575 through A-1575(c). On November 2, 2005, the State Board dismissed the City's petition without prejudice. To date, the City has not filed a new petition. The other petitions challenging the 2003 CAO were also dismissed without prejudice.

of the state and creates, or threatens to create, a condition of pollution or nuisance. In response to petitions challenging application of Water Code section 13304, the State Board has issued many orders interpreting Water Code section 13304. In general, the State Board has directed the Regional Water Boards to name in cleanup and abatement orders all persons who have caused or permitted a discharge of waste.² See, e.g., Orders Nos. WQ 85-7 and 86-16.

The City "caused" the waste to be discharged because the waste was on land belonging to the City, in other words the waste was owned by the City, and the City hired Baldwin to remove the waste. Baldwin placed the waste on Area 8. The City could also be considered to have "permitted" the waste to be discharged because it hired Baldwin and included in the contract with Baldwin permission to take the materials from the Bruce Road Extension and dispose of them. The disposal of the materials at Area 8 created a condition of nuisance and threatened to discharge into waters of the state.

The City argues that it relinquished its responsibility by giving the excavation materials to Baldwin. Water Code section 13304 does not distinguish between "owners" and "contractors", but, rather, applies to persons who "cause" or "permit" a discharge of waste. The waste belonged to the City and the City hired someone to remove it and dispose of it. The fact that there was an intermediary who actually moved the material and that the City may not have explicitly chosen the site of disposal does not negate the City's liability for its own waste. The waste was on land owned by the City, the City contracted to have the waste moved, and the waste was discharged to Area 8. The waste was not a product for sale, such as gasoline, but was a part of the contract between the City and Baldwin to dispose of the excavation materials. In addition, the City had some knowledge that the waste would go to the Area 8 parcel and it was convenient for the City's project that the waste could go to neighboring parcels for disposal. The City negotiated with Mr. Simmons with respect to the Bruce Road Extension because it would affect the ability of Mr. Simmons to graze stock on the Area 8 parcel. The City also helped to determine whether any permits were needed to build the stock pond. The City, therefore, "caused" the waste to be discharged and may be held responsible under Water Code section 13304.

Water Code section 13304 does not require proof of intent or negligence, rather it is a strict liability statute. The City's intent to give the waste away, or lack of some specific intent to dispose of the waste at Area 8, does not avoid the City's liability. In addition, it appears that neither Baldwin nor Simmons knew that the waste contained high levels of lead and other wastes at the time of discharge, and, therefore, these parties do not appear to have been negligent in discharging the waste at Area 8. It is not clear in the record whether the City knew about the

² Water Code section 13304 has consistently been broadly construed. See, e.g., *Lake Madrone Water District v. State Water Resources Control Board*, 209 Cal.App.3d 163, 256 Cal.Rptr. 894 (1989). In this case, however, applying Section 13304 to the City is not a broad construction of section 13304 because the waste belonged to the City and the City contracted for its disposal.

nature of the waste, but it does appear from the record that the City was aware that the area of the Bruce Road Extension project was an area where burn dump activities occurred. Arguably, if the City knew about the burn dump activities, it would be inappropriate to have permitted that waste to be moved without sampling it. Water Code section 13304, however, does not require proof of negligence, and, therefore, whether the City knew that the source of the material was a burn dump is not relevant to liability under Section 13304.

The City has also acknowledged its liability for the waste. In 1997, the City applied to the Site Designation Committee pursuant to Health and Safety Code section 25262 requesting that the Committee designate the Central Valley Water Board as the administering agency. That statute authorizes a "responsible party" to make such requests. By using Health and Safety Code section 25262, the City acknowledged itself as a responsible party for all 15 parcels of the HRBD.

The City is also not relieved of liability based on its assertion that it did not own the Bruce Road Extension area at the time burn dump activities occurred that caused the property to be contaminated. At the time of the Bruce Road Extension project, the City owned the property on which the project occurred, and, therefore, owned the material that contained the lead waste. As further discussed below, the State Water Board has consistently held that owners are responsible for the condition of their property even if they did not themselves conduct the activity that caused the discharge of waste.

The City has also suggested that it is not responsible for the cleanup of Area 8 because it is not a liable party pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601 et seq.). CERCLA does not control in this case whether the City should be held liable for the cleanup of Area 8. The Water Board's action was taken pursuant to the Water Code, not CERCLA. Even if CERCLA were applicable, however, the City would likely be liable at a minimum pursuant to CERCLA section 107(a)(3) as a person who "by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person." The City arranged by contract with Baldwin to dispose of the waste. Federal cases interpreting that section of CERCLA have not required that the person retain the control of the terms of disposal to be considered an "arranger" within the meaning of CERCLA section 107(a)(3). See, e.g., *Catellus Development Corp. v. U.S.* 34 F.3d 748 (1994). CERCLA does not allow persons to contract away their liability. See, e.g., *State of New York v. General Electric Co.* 592 F.Supp. 291 (N.D.N.Y. 1984).

Liability of the Landowners

The Drake Trust and Simmons parties did not file a petition with the State Board challenging the 1988 and 2003 CAOs or the Section 13267 orders. This Memorandum, however, at your request, provides an analysis of the liability of the landowners.

As described above, the current landowners have undivided 1/4 or 1/2 interest in Area 8. With the exception of Ms. Drake (although she is the Trustee for the owner), each of the landowners owned the parcel at the time of the discharge of the waste at Area 8. Mr. James Simmons granted permission for Baldwin to discharge the waste at the property to build a stock pond levee. See letters dated August 13, 1987 and December 21, 1987 from James E. Simmons to Baldwin and the Water Board respectively.

The State Board, in interpreting Water Code section 13304, has consistently held that landowners are responsible for the condition of their property. The State Board has concluded that where the landowner has knowledge of the discharge and sufficient control of the property, the landowner should be subject to a cleanup order under Water Code section 13304. See e.g., Order Nos., 84-6, 86-18, 89-1, and 89-8; cf *Leslie Salt Company v. San Francisco Bay Conservation & Development Commission* (1984) 153 Cal.App.3d 605, 200 Cal.Rptr. 575. In several of those Orders, the landowners claimed not to be aware of the activities on the property, but, nevertheless, the State Board found such landowners to be liable under Water Code section 13304. In this case, the landowners are aware and at least one landowner gave permission for the material to be discharged on the property.

Other Issues

In general, the State Board has concluded that the Regional Water Boards should not try to apportion liability between parties. See, e.g., Orders Nos. WQ 86-2 and 88-2. In addition, the State Board has concluded that liability under Water Code section 13304 is joint and several. See, e.g., Order No. WQ 90-2.

In conclusion, it was appropriate for the Executive Officer to name the City, Drake Trust, and Simmons, as responsible parties to the 1988 and 2003 CAOs and the Water Code section 13267 Orders.

If you have further questions, you may contact me at the above address or call or email me. My phone number is (916) 341-5174 and my email is fmcchesney@waterboards.ca.gov

cc: See next page

Kenneth D. Landau
James C. Pedri

- 9 -

February 23, 2006

cc: David R. Frank
Office of the City Attorney
411 Main Street, 3rd Floor
P.O. Box 3420
Chico, CA 95927
dfrank@ci.chico.ca.us

K. Greg Peterson
Law Office of K. Greg Peterson
1716 L Street
Sacramento, CA 95814
greg@kgregpeterson.com

Randall Nelson
Carr, Kennedy, Peterson, and Frost
420 Redcliff Drive
Redding, CA 96002
rnelson@ckpf.com

Michael V. Brady
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
mbrady@diepenbrock.com

Mac Goldsberry
Goldsberry, Freeman, Busman & Ditoro LLP
777 12th Street, Suite 250
Sacramento, CA 95814
mac@gfsacto.com